

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

3 CENTRAL DIVISION

4

5 UNITED STATES OF AMERICA,)

6 Plaintiff,)

7 vs.) CASE NO. 2:07-CR-345DB

8 HARRISON BEGAYE,)

9 Defendant.)

10 _____)

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12 BEFORE THE HONORABLE DEE BENSON

13 -----

14 April 15, 2009

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19 Imposition of Sentence

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1 A P P E A R A N C E S

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1 April 15, 2009

2:00 p.m.

2 P R O C E E D I N G S

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4 THE COURT: United States versus Harrison Begaye.

5 This is 07-CR-345. Lynn Clark Donaldson and Robert Steele
6 are here representing the defendant and the defendant, Mr.
7 Begaye, is here. Trina Higgins is here for the United
8 States.

9 Do you have an agent there?

10 MS. HIGGINS: Yes, Your Honor. This is Special
11 Agent Rachel Boisselle.

12 THE COURT: Nice to have you here.

13 We'll proceed with this sentencing. I have
14 received a motion for an upward departure from the United
15 States and a response from the defense and a letter from the
16 defendant. I would be happy to hear from counsel for the
17 defense to begin with.

18 Mr. Donaldson, is that you or Mr. Steele?

19 MR. DONALDSON: It is me.

20 First, Your Honor, a little housekeeping matter --

21 THE COURT: Okay.

22 MR. DONALDSON: -- in terms of a facility
23 recommendation. We would ask the Court to recommend that
24 Mr. Begaye go to F.C.I. Seagoville, Texas. Mr. Steele has
25 done the Bureau of Prisons calculation and we think that

1 either that facility or F.C.I. Marianna, Florida, and that
2 is to facilitate the participation in psychological and sex
3 specific treatment.

4 THE COURT: Where was the first one in Texas?

5 MR. DONALDSON: Seagoville.

6 THE COURT: Seagoville.

7 MR. DONALDSON: This is not a pleasant situation
8 for anybody, and some of the arguments that have been made
9 in this case, we make them in the context of the commission
10 of a very serious crime and Mr. Begaye acknowledges that.
11 Any contact of a sexual nature between an adult and a child
12 is grave. I guess the point that I would make for the Court
13 is that at least when Mr. Begaye was first approached by
14 Special Agent Larsen and the interview proceeded, he does
15 seem to have an interest and his disclosure comes in the
16 context of a discussion about a number of things, but one of
17 those is about the possibility of getting treatment and they
18 discuss it, and being with the tribe or elsewhere, but
19 getting mental health treatment, the first time he had been
20 accused of having relations with his daughter and that came
21 up. That was not a planned meeting. It was not anything
22 that he had prepared for.

23 I have attached the I.Q. testing that we had --

24 THE COURT: Right. I have seen that.

25 MR. DONALDSON: I just don't think that Mr. Begaye

1 is the type of individual who is very sophisticated, and I
2 believe that that actually lends some credence. I suppose
3 from an evidentiary standpoint, it is the horrible things he
4 disclosed, but we're here for sentencing and those are the
5 other things that he disclosed. I think that lends credence
6 to his disclosures.

7 Some of the other things that we have pointed out
8 is about the testing of his then 11-year-old daughter and
9 her performance in school, and that may give the Court an
10 idea of what we think might be the range of the number of
11 acts that he committed. One act is too many.

12 The other thing that I wanted the Court to know
13 and that Mr. Begaye wants you to know is that he does want
14 to get treatment. He has done everything that he can do
15 virtually while he has been in the Davis County Jail. He
16 has participated in every kind of program that was
17 available, including even going back to school, going to
18 parenting classes, going to everything that was there.

19 I didn't attach this, but I just wanted to read
20 you a short portion of a letter from a woman named Chris
21 Confrey who runs the New Directions program in the Davis
22 County Jail. Inmates go to this and I think they have to go
23 to 24 sessions. She says I was pleased to have Harrison as
24 a student in the New Directions classes. He attended all of
25 his classes and participated willingly and eagerly. He

1 acknowledged that there were changes that he would like to
2 make in his life and to set goals and to work toward those.
3 I believe the comments he offered to the group and the class
4 and with others were helpful. In his quiet, calm manner and
5 civility he displayed an attitude of wanting to change.

6 It is hard to convey that to a Court and you're
7 always taking some kind of a risk when you latch onto that,
8 but I don't know what else he could have done given the
9 gravity of what he has admitted to.

10 Most of this is in our papers, but the one thing I
11 would say in terms of public safety and in terms of
12 deterrence, the guideline range as it stands right now
13 without any departure is very high. It is a significant
14 chunk of a person's life. Just to give you an idea as you
15 fashion your sentence and look at the 3553(a) factors,
16 consider this: In ten years, in other words, once he has
17 been in custody for ten years, his oldest child will be 23,
18 about 24. The next oldest child, the victim of the offense
19 that he pled to here, she will be 21. The next oldest son
20 will be 19 years old. Those are my calculations from the
21 dates of birth that we have received from the government.

22 This Court has incredible power to fashion
23 conditions of release. You can put him on supervision up to
24 his natural life. This is a man who previous to this time
25 has virtually no criminal record and has done about 30 days

1 in jail.

2 As some of the articles that I cited to you from
3 some of the psychological studies that have to do with
4 deterrence say, at some point, and I realize this can be a
5 component of any court sentence, and it is simply
6 retributive, but if we are talking about deterring conduct
7 and helping someone rehabilitate him or herself, which is
8 ultimately I think in some ways our best assurance of safety
9 for the community, that can be accomplished either at the
10 low end of the guideline range or a sentence in the ten-year
11 range.

12 If you have any questions, I would be happy to
13 answer them.

14 THE COURT: No, I don't. You can respond to Ms.
15 Higgins who I will hear from now.

16 MR. DONALDSON: Okay.

17 MS. HIGGINS: Thank you, Judge.

18 At the Court knows, the government is asking the
19 Court to upward depart in this case and to impose a sentence
20 of 360 months. We are also asking the Court to impose
21 lifetime supervision to follow whatever term of
22 incarceration the Court ultimately imposes. A 360-month
23 sentence in this case is warranted as an upward departure
24 and as an upward variance or either or both. It is a
25 reasonable sentence and it is justified under the

1 circumstances of this case.

2 The Court has received the government's motion
3 outlining all of our reasons, and I'm aware that the Court
4 also viewed the video that was attached and the transcripts
5 and all of the psychological and physical health records of
6 the children. I would like to briefly go through those
7 topics and answer any questions without rearguing all of the
8 same things in the memo.

9 The first reason that warrants an upward departure
10 in this case alone warrants an upward departure of 360
11 months, and each of these factors would alone and certainly
12 together warrant a departure of this size. The first factor
13 that the government brought up in the brief and that I will
14 argue here is 5K2.8, the extreme conduct. In this case the
15 defendant's behavior was unusually cruel and brutal and
16 degrading to this young victim.

17 Now, the defense argues in their response that it
18 does not make it any different from other aggravated sexual
19 abuse cases. That is really the crux of 5K2.8. Of course
20 this crime is cruel and of course it is brutal and of course
21 it is degrading, but why is this particular case unusually
22 so? What makes this case different from the other cases to
23 warrant an upward departure? Well, several factors.

24 One in particular is that this case involves two
25 aggravating factors, either of which would make this

1 aggravated sexual abuse. Under 2241(a) sexual abuse is
2 enhanced to an aggravated sexual abuse if the person uses
3 force to abuse their victim. Under 2241(c) sexual abuse is
4 enhanced to an aggravated sexual abusive if the sex abuse is
5 against a child, so there are two separate aggravating
6 factors. In most child sex abuse cases we don't also have
7 force. It is usually a situation of bribery or coercion
8 where the child is talked into it, the child is sleeping,
9 they use some sort of coercion or bribery.

10 That is not the case in this case. We are talking
11 about a forcible rape. The defendant pled guilty to and
12 admitted that he forcibly raped this child. We have two
13 aggravating factors. We have both the forcible rape and the
14 fact that this child is under the age of 12. That is one
15 factor that makes this very different from your typical
16 aggravated sexual abuse is that we're talking about two.

17 THE COURT: Why did you then not insist on
18 prosecuting that charge? You want to let him plead guilty
19 to the lesser charge and yet still come in and get all of
20 the punishment for the more aggravating conduct. Help me
21 out with that.

22 MS. HIGGINS: Sure.

23 THE COURT: Is that fair?

24 MS. HIGGINS: Sure. I will address that issue,
25 Your Honor.

1 Something that we don't talk about generally is
2 the reasons for the plea negotiations, and the defense
3 raised it in their memorandum and already explained it to
4 the Court and the Court asked a question so I will go into
5 that further.

6 The defendant was charged with a 30-year minimum
7 mandatory. The defendant would not plead guilty to a
8 30-year minimum mandatory. In order for the government to
9 have gotten that 2241(c) conviction, the government would
10 have to put on a trial, and the Court knows I would never
11 back down from the trial, but this was about the children.
12 The Court read the mental health reports and the
13 psychological evaluations of these children. Jamesina
14 Begaye is in no condition to take the stand and testify
15 against her father. Putting her through a trial would have
16 caused cruel and unusual pain and suffering to that poor
17 girl.

18 She would have been further traumatized by having
19 to go through a direct examination and a cross-examination
20 and to sit before this Court and have sat through a trial.
21 Not only Jamesina but for Jareson and Jameson. None of the
22 children wanted to come to court.

23 THE COURT: Well, that may be, and I am not
24 contesting the reason that allowed him to plead to a lesser
25 charge, but you seem in one way of looking at it to want to

1 get the plea to the lesser charge and get the punishment for
2 the greater charge as if he had gone to trial.

3 MS. HIGGINS: Your Honor, that is the case.

4 THE COURT: It is a little bit like you want your
5 cake and eat it too.

6 MS. HIGGINS: I think that is exactly the case,
7 Your Honor. Let me point out a few things.

8 THE COURT: Was he informed of that when he pled?

9 MS. HIGGINS: Absolutely.

10 From the very first of the plea negotiations, and
11 Mr. Donaldson can attest to this, I made it very clear that
12 I felt the 30 years was an appropriate sentence. I never
13 wavered on that. 30 years was an appropriate sentence.
14 When we discussed plea negotiations, one of the things that
15 we discussed was that I would be asking for an upward
16 departure. That was kept open in the negotiations, that he
17 would be allowed to ask for a downward departure and I would
18 be allowed to ask for an upward departure, and he knew from
19 the beginning that it was my intention to ask for an upward
20 departure. That has been known and that was on the table
21 from the beginning, all along, that I would ask for an
22 upward departure.

23 I don't think we ever discussed exactly what level
24 I would ask for. I asked for this particular level because
25 it fits with the congressional decision that sex with a

1 child under the age of 12 is worthy of 30 years. It seemed
2 in this case, with all of the factors, that this case should
3 be worthy of at least that minimum mandatory. It has been
4 on the table from the very beginning that I would ask for an
5 upward departure.

6 Now, had we gone to trial, it is true that the
7 defendant would then be facing a 30-year minimum mandatory.
8 He would, in fact, had he been convicted of all charges,
9 there would be three counts of aggravated sexual abuse which
10 the Court could have run consecutively. So in truth the
11 minimum mandatory, the very least the Court could have
12 imposed after trial was 30 years. The Court could have gone
13 up to a 90-year minimum mandatory.

14 THE COURT: I could go up to life.

15 MS. HIGGINS: Well, that is true. The Court could
16 even now go up to life.

17 THE COURT: Life is the maximum under 2241(a).

18 MS. HIGGINS: That is true. The Court could
19 impose a life sentence under either. So we are not talking
20 about changing the maximum in this case, we are just talking
21 about the minimum mandatory.

22 THE COURT: I am only asking about the inducement
23 for a plea. We would hate for the government to have its
24 future plea bargaining efforts hampered by some knowledge
25 that they are just pleading him into a trap. They induce

1 you to plead to a lower charge and then get the same
2 punishment as if you had gone to trial, and at least the
3 perception might be that you're getting no benefit from
4 pleading. I just wondered about that.

5 MS. HIGGINS: Sure, because the ultimate benefit
6 is you may end up with the same sentence, but I think that
7 is not really that far from what we do in a lot of cases.

8 THE COURT: Well, then why would anyone plead?

9 MS. HIGGINS: Sure. We plead from one charge to
10 another, but ultimately it is up to the Court. The Court
11 could impose the same sentence in --

12 THE COURT: There is usually some perceived
13 advantage, getting acceptance of responsibility or
14 something.

15 MS. HIGGINS: The perceived advantage is exactly
16 what the Court sees in this case, and that is that the
17 defendant has the ability to argue for something less, the
18 possibility that he could put together enough mitigating
19 circumstances to convince a Court to go lower. We kept the
20 ability to argue for that sentence. So really it is just a
21 matter of taking this case and putting it in the Court's
22 hands.

23 I understand the concern that the plea is to a
24 different charge, and I am still asking for the minimum
25 mandatory, and maybe I would have been asking for more had

1 we gone to trial.

2 THE COURT: Let him plead to A, and then as soon
3 as the presentence report gets done, it turns into C. It is
4 a de facto C, not a de jure C. It is a C, aggravated sexual
5 abuse of a minor, of a child under 12, and you want all the
6 punishment that goes along with that heinous crime.

7 MS. HIGGINS: I am asking for that, Your Honor,
8 because the 30 years accurately reflects the conduct.
9 Ultimately that is what the sentence should do. Regardless
10 of what plea negotiations went on between the parties, the
11 sentence should accurately reflect the defendant's conduct.
12 He is not denying that he raped a child, even though that is
13 not the charge he pled to. He has admitted that he raped a
14 child at least three times. This sentence should reflect
15 the conduct.

16 I want to talk a little bit more, but please
17 continue to interrupt me with any questions the Court has.

18 THE COURT: There seems to be some information in
19 here somewhere, and I have looked at a lot, but the
20 defendant's family is of the opinion that he is not guilty
21 of anything.

22 Have you seen that? Where did I get that from?

23 MS. HIGGINS: I believe that was from a
24 conversation in the presentence report with his brother.
25 His brother felt the government was framing him.

1 Was that in the presentence report?

2 MR. DONALDSON: Your Honor, I can help the Court.

3 It was in an interview Ms. Shuman conducted I think over the
4 phone with one of his brothers, I believe Joe Begaye. That
5 is one person that --

6 MS. HIGGINS: It is paragraph 43.

7 MR. DONALDSON: That is who it is.

8 MS. HIGGINS: It is in paragraph 43 of the
9 presentence report, Your Honor.

10 THE COURT: Okay. That the government set up his
11 brother. Okay. Thank you.

12 MS. HIGGINS: In talking about 5K2.8, the extreme
13 conduct, the force of this and the degradation it was to the
14 victim, and as the Court saw in the video of Jamesina's
15 interview, she talks about this experience of her father
16 forcibly grabbing her and raping her and pinning her down,
17 either him on top of her or holding her down on top of him
18 while she is trying to escape. As you watch her explain
19 this, you can see that this was not something where he just
20 talked her into it. He didn't bribe her into it. He used
21 force to rape this young child. You can see her reaction to
22 that, that this was particularly degrading to her. She said
23 every time he asked her does it feel good? And every time
24 she said no.

25 Moving on to the next potential section for an

1 upward departure, Section 5K2.21, and we have discussed this
2 a little bit, this is whether the Court should consider the
3 dismissed conduct or the uncharged conduct. In this case
4 the government charged in a superseding indictment six
5 counts, three counts of rape of a child and three counts of
6 aggravated assault. As we have just discussed, due to the
7 plea negotiations, the defendant was allowed to plead to the
8 forcible rape rather than rape of a child, but both the
9 sentencing guidelines and the case allow this Court to
10 consider the dismissed conduct. The Court should consider
11 that conduct when formulating a sentence that appropriately
12 and accurately reflects the defendant's conduct.

13 We have talked about the rape of a child, so let
14 me talk very briefly about the three counts of aggravated
15 assault. I went through those a little bit in my sentencing
16 memo, and there were a lot of medical records and
17 psychological evaluations that talked about that further.
18 Here is a man who --

19 THE COURT: That just bothers me a little and I
20 don't know why. Maybe I do know why. I am not sure it is
21 rational.

22 MS. HIGGINS: Okay. Which part?

23 THE COURT: The part about in the guidelines
24 themselves we have 5K2.21 stating that the Court may depart
25 upward to reflect the actual seriousness of the offense

1 based on the conduct underlying the charge dismissed as a
2 part of the plea agreement in the case.

3 I think of a situation, and let's say someone was
4 originally charged with kidnapping and murder and does not
5 want to plead to the murder so they plead out to kidnapping.
6 Following this logic then we would sentence the person, if
7 we find from the facts that he committed murder. That does
8 not make entirely a lot of sense to me. If we had a jury
9 trial and we have the same situation and the jury came back
10 with a conviction on kidnapping and an acquittal on murder,
11 and if the Court at sentencing found the facts supported a
12 murder, which is more egregious than kidnapping, could that
13 judge sentence on the basis of a murder?

14 MS. HIGGINS: We in fact have been in this exact
15 situation, Your Honor. The Court may recall I tried --

16 THE COURT: What is the answer to that question,
17 yes or no?

18 MS. HIGGINS: The answer is absolutely yes. The
19 case law supports that the acquitted conduct can be used.
20 In fact, we have been through this. The Court may recall I
21 tried a child rape case in front of you some years ago. The
22 case was originally tried in Judge Campbell's court where
23 the jury acquitted the defendant of forcible rape. The case
24 was tried again before Your Honor on other counts that the
25 jury hung on, including rape by threat rather than force.

1 Also, child rape. There was also a child rape count. The
2 defendant was convicted of those counts. We had this same
3 discussion at the sentencing hearing as to whether or not
4 the Court could consider the acquitted conduct, the forcible
5 rape for which the defendant had been acquitted.

6 The case law is very clear that the Court can
7 absolutely consider acquitted conduct because a jury's
8 verdict of acquittal does not mean not guilty. It means the
9 government did not prove it beyond a reasonable doubt. It
10 does not mean not guilty.

11 A plea negotiation in this case does not mean that
12 the defendant did not rape his daughter.

13 THE COURT: No. No one is suggesting that it
14 means that, but it does seem a little odd that he pleads
15 guilty to one thing and yet we sentence him as if he had
16 pled guilty to the other thing --

17 MS. HIGGINS: It is absolutely the Court's --

18 THE COURT: -- in reality.

19 MS. HIGGINS: Under the case law as it currently
20 exists, this Court has huge discretion, and this Court can
21 decide what to give it, whatever weight the Court believes
22 is fair and justified. It is the government's position that
23 that is the appropriate sentence in this case because it
24 accurately reflects the conduct. Ultimately it is in the
25 discretion of the Court to make that decision. This

1 defendant's conduct goes so far beyond what is --

2 THE COURT: What he pled to?

3 MS. HIGGINS: What he pled to, absolutely. The
4 crime that he pled to, the one count crime that he pled to,
5 and the sentencing guidelines that are connected to that one
6 count do not take into consideration the years of physical
7 and sexual abuse of his children. It does not take into
8 account any of the whippings, any of the poking with
9 needles, and it does not take into account the B.B. gun shot
10 in the face, and it does not take into account a tire iron
11 across the top of the head, and it does not take into
12 account the scars, the stitches. These children are covered
13 in scars at the hand of Mr. Begaye. None of that is
14 included in the calculated guideline sentence. None of that
15 is included in the crime charged, but it accurately reflects
16 the conduct and the behavior of this man.

17 We talked just briefly about the extreme
18 psychological injury. While it is true that to get this --

19 THE COURT: Is it true that there is no evidence
20 that he was sexual with any of the other children?

21 MS. HIGGINS: That is true.

22 THE COURT: All of this you have been just talking
23 about is not covered in 2241 at all.

24 MS. HIGGINS: The only sexual abuse is against
25 Jamesina.

1 THE COURT: All that you told me was so egregious
2 and not taken into account, the marks he has left on the
3 other children, those were not involving any kind of sexual
4 misconduct?

5 MS. HIGGINS: No.

6 THE COURT: Okay.

7 MS. HIGGINS: The only other daughters the
8 defendant has from Rena Begaye were very young at the time,
9 and Jamesina did not believe that they were being subjected,
10 nor do we, that there was any physical abuse. The only
11 evidence is that the physical abuse was toward Jamesina and
12 no one else. All of the other abuse does not fall anywhere
13 in 2241. That falls under the category of dismissed
14 conduct, because that is the conduct that the government
15 intends to dismiss as a part of the indictment at the end of
16 this hearing.

17 That would be additional dismissed conduct that
18 would warrant an upward departure because it accurately
19 reflects what was going on, not just the sexual abuse.

20 5K2.3 talks about an extreme psychological injury.
21 Now, the tricky part about this is that the government has
22 to show that this injury was more serious than your average,
23 shall we say, sex abuse case. It does not require expert
24 testimony. The Court can see that Jamesina's psychological
25 damage is extensive.

1 Now, one would expect the victim of sexual abuse
2 to have P.T.S.D. I think that is fairly common and we see
3 it a lot, but this young child has many other problems and
4 disorders. She has adjustment disorders and anxiety. She
5 has traumatic dreams and hallucinations. Here is a child
6 who is barely hitting her teenage years and she is already
7 taking Seroquel for hallucinations. That is extreme
8 psychological injury. This is not just P.T.S.D. and she is
9 going to get over this. A year after this she is still
10 being treated for hallucinations and anxiety, so there is
11 extreme psychological injury to this young child.

12 I want to talk about also the unidentified
13 characteristic which I brought up, and these really go
14 together, and that is the number of years this took place
15 and the number of times. Now, the evidence to support the
16 fact that this happened far more times and over a much
17 longer period than what the defendant has admitted comes
18 primarily from the victim herself. The Court had the
19 opportunity to watch the video and could weigh her
20 credibility, and you were able to actually see her when she
21 talked about it. She said that it had been happening
22 approximately once a week since first grade.

23 Now, in a later report she told one of the
24 psychologists since second grade, so there is a discrepancy
25 between first and second grade, but we are still talking

1 about a matter of years, that this abuse has been going on
2 for years. It wasn't a discrepancy of one time she said a
3 couple months and one time she said a couple years, the
4 discrepancy was first grade and second grade.

5 Now, there is an additional fact that I wanted to
6 put before the Court regarding this particular issue,
7 because I think this issue is really important, the length
8 of time and the number of times that this abuse occurred is
9 a really important factor in formulating the most
10 appropriate sentence.

11 The additional evidence is I have here with me an
12 employee of the U.S. attorney's office who was present when
13 we interviewed Jameson. We interviewed Jamesina, Jareson
14 and Jameson. As the Court read in the defendant's
15 memorandum, the guardian ad litem approved that and we went
16 and met with them at the shelter. Their mother was present
17 but she was not in the room when we interviewed them
18 individually. Mr. Donaldson has agreed that I could simply
19 proffer this evidence to the Court rather than put the other
20 person who was in the room on the stand and have her testify
21 to it.

22 When I spoke to Jameson Begaye, he said that he
23 had a pretty good idea about what was going on. So I asked
24 him to tell me what he thought was going on and why. He
25 said to me a long time ago my dad asked me to ask my health

1 teacher if a nine-year-old could get pregnant. That
2 statement really stuck with us because it fits with
3 Jamesina's statement. A nine-year-old would be at about
4 second or third grade, so this had been going on for years.
5 Mr. Begaye had his son ask his health teacher whether or not
6 a nine-year-old could get pregnant to make sure, because he
7 certainly didn't want to impregnate his young daughter, but
8 that is further evidence that Jamesina was telling the truth
9 when she said that this had been going on for years.

10 Now, if the Court would like I could have that
11 testimony put on the record through the other witness, but
12 Mr. Donaldson felt it would be enough for me to just proffer
13 it.

14 THE COURT: That is okay.

15 MS. HIGGINS: Thank you.

16 THE COURT: You don't need to put her on. Is it a
17 her or a he?

18 MS. HIGGINS: It is Ms. Cecilia Swenson. She is
19 our victim coordinator from the U.S. attorney's office.

20 The fact that this went on over a number of years
21 and so many times is not anywhere included in the
22 calculation of the defendant's sentence. The calculation of
23 the sentence and the guideline range in the presentence
24 report would be exactly the same if this happened once. If
25 Harrison Begaye had one time raped his daughter, he would be

1 facing the exact same sentencing guideline range that is in
2 his presentence report. He himself admits that he raped her
3 at least three times. She said it had been going on since
4 first or second grade, approximately once a week. There is
5 no enhancement for that in the guidelines, there is no
6 upward departure for it included, but it is a factor, it is
7 a factor that the Court should consider. When fashioning an
8 appropriate sentence in this case, the Court should consider
9 the number of years and the number of times that Mr. Begaye
10 subjected his young daughter to this abuse.

11 Now, aside from the upward departure that the
12 government is asking for, and I have just covered all of the
13 reasons within the sentencing guidelines manual that the
14 Court should upward depart, and that alone is reason for the
15 Court to impose a sentence of 360 months.

16 Along with that, a sentence of 360 months is
17 warranted as an upward variance. Going through the factors
18 in 3553(a), those factors apply to this case and warrant a
19 sentence of 360 months. I won't go through each of them
20 because I think they overlap greatly with all of the things
21 that I have talked about in the upward departure. But if
22 you start looking at the nature and circumstances of this
23 crime, it certainly warrants the 360 months which Congress
24 felt was a minimum mandatory, a minimum sentence that should
25 be imposed for just one rape of a child. In looking at the

1 nature and circumstances of this case, that would be the
2 appropriate sentence when considering how many times the
3 defendant raped his daughter, and how cruel he was and how
4 brutal these rapes were to this young girl and the damage
5 left upon her.

6 None of the factors weigh in favor of giving this
7 defendant a sentence under the guideline range. I would ask
8 the Court to impose a sentence of 360 months incarceration
9 and a lifetime of supervision.

10 THE COURT: Thank you very much.

11 Mr. Donaldson, do you want to say anything in
12 response?

13 MR. DONALDSON: Yes.

14 Let me just start with your question about the
15 plea negotiations. I suppose any time there is a
16 conversation everybody has their perspective on things. Let
17 me tell you this much, that we did discuss the possibility
18 of stipulating to sort of an 11(c)(1)(C) kind of situation
19 where the Court would be limited to the guideline range, the
20 appropriately calculated guideline range. We discussed a
21 lot of things. I am not saying that Ms. Higgins didn't say
22 during our negotiations that she thought this case might
23 warrant 30 years. I don't know that we went into this
24 thinking that she would file an upward departure requesting
25 30 years.

1 We did agree that the parties were not bound, as
2 the rules permit, to make arguments for a non-guideline
3 sentence. That part is true, but I still think that the
4 arguments that I made, and at least some of the concerns the
5 Court has referenced under 5K2.21, that those policy
6 concerns hold true. Any departure is discretionary. 5K2.21
7 says the Court may depart upward. 5K2.3, 5K2.8, every
8 single basis they are asking for is discretionary.

9 To be a little more specific, taking 5K2.28, you
10 may be familiar, and maybe not, that there is a case called
11 U.S. versus Holly and the majority writer is Judge Murphy,
12 and it has to do with the application in a civil rights
13 action that was brought against a county sheriff and the
14 meaning of force under Section 2241(a), the section of the
15 statute that Mr. Begaye pled to.

16 In discussing what force meant and whether the
17 instruction given to the jury in Mr. Holly's case was
18 appropriate, the Court analogizes to situations where there
19 is a lot of sort of a desperate relationship, a father and a
20 child, a county sheriff or a jailer, the commander of a jail
21 and an inmate, and basically what it says -- I think I made
22 this comment at the time you took his plea about force. It
23 says, and I am looking at page -- I will give you the cite
24 here. It is 1301 of U.S. versus Holly, 488 F3rd at 1298.
25 It says the requirement of force may be satisfied by a

1 showing of restraint sufficient to prevent the victim from
2 escaping the sexual conduct. Force may also be implied from
3 a desperate and coercive power or insight between the
4 defendant and the victim or from the disparity and force of
5 the power combined with the physical restraint.

6 Basically what the case law says is that they draw
7 from the guideline that applies here, and what the Tenth
8 Circuit does is they say we are going to take our guideline
9 case law on what force is and when that specific test
10 characteristic applies and we're going to use it to
11 interpret the statute. I guess my point is that that is
12 already considered and he gets that increase because he pled
13 to the statute and that is what it means at a minimum.
14 Enough about that.

15 I pointed out Reyes Pena, and if you look at Reyes
16 Pena, the facts in this case, and this is sort of like which
17 is most ghoulish, the facts in Reyes Pena in some ways are
18 more aggravated than what you have got here in terms of the
19 kind of force that the stepfather or father used in that
20 situation. Enough said there.

21 I would ask the Court not to grant the extreme
22 conduct increase.

23 In terms of the dismissed conduct, I have some of
24 the concerns, as I said, that this could cause -- basically
25 if there is no benefit for someone pleading in a situation,

1 then the cases will go to trial. I think it is an
2 appropriate consideration for both the government and in the
3 right cases, assuming the defendant cares, and he should
4 care or she, whoever the defendant is, that the trial can
5 have a really deleterious effect on the children. It can be
6 traumatic and tough. It may have long lasting impacts.

7 If in this situation we basically allowed a plea
8 with the lower guideline and then turn around and basically
9 say, well, no, we are going to give the mandatory minimum,
10 the kind of things that the Tenth Circuit said in the Daisy
11 case about huge increases really should apply here, that the
12 Court needs to be very certain. In a way we pled and there
13 are lower standards and there are no Rules of Evidence and
14 it is in a way easier to allege and just under the
15 guidelines get -- anyway, you understand it. I won't
16 belabor that anymore.

17 In terms of the extreme psychological injury,
18 again, this is the context we are in. Posttraumatic stress
19 disorder is a horrible thing. It is horrible. I have had
20 clients that have had it and I have seen children that have
21 had it and it is bad. Unfortunately, I think it is more
22 common than not in many of these situations and in an
23 offense like this, so I don't think that the increase
24 applies.

25 As to the unidentified characteristics, you're

1 well familiar with the Coon case and the Supreme Court's and
2 the Sentencing Commission's position. They have thoroughly
3 and exhaustively looked at guidelines like 283.1 and they
4 have amended that guideline 11 times since its adoption in
5 1987. It is hard to say that they wouldn't take situations
6 like this into consideration.

7 The other thing is in terms of the proffer, and I
8 have no doubt that the oldest son with initials J.A.M., that
9 he may have said what he said to Ms. Higgins in February of
10 this year when they went down to talk to him, that his dad
11 said something a couple years earlier. I'll also tell you
12 that we interviewed -- it wasn't me, it was Ms. Koch and
13 Mr. Sebert, an investigator from our office, but they
14 interviewed every single teacher, the principal, everybody
15 at this school, Bluff Elementary. It is about a 70 or
16 80-student -- it is not quite a one-room school house -- not
17 one of them could think of any sort of indicator except
18 possibly maybe a little bit of a change in the academic
19 performance of J.A., the then ten or 11-old-year-old girl,
20 that there was any indication of this in looking back.
21 These people were lamenting the situation and they wanted to
22 do better in the future, so to speak.

23 I would ask the Court because of the grounds of
24 rehabilitation, and because Mr. Begaye desires to get help
25 and to make up for what he has done, and because treatment

1 can be effective, to consider imposing a sentence of less
2 than the guidelines. You have my papers.

3 Thank you.

4 THE COURT: I do on that. Thank you.

5 We have a motion both ways here, a motion for an
6 upward departure and a motion for a downward departure.

7 Mr. Begaye, would you like to say anything in your
8 own behalf?

9 MR. BEGAYE: Yes, Your Honor.

10 THE COURT: You may. You can step to this
11 microphone. It might be easier to hear you there.

12 MR. BEGAYE: Good afternoon. You know my name. I
13 am here -- not here to argue with the Court or anything. I
14 am not making a name for myself by breaking the law. I am
15 just here -- I just hope that the Court will have mercy on
16 me and give me a chance to be a father and a husband and a
17 dad and work as a family and united and heal our hearts and
18 our minds and souls as a united family.

19 That's all that I ask.

20 THE COURT: Thank you, Mr. Begaye.

21 On the motion for downward departure brought by
22 the defense, I deny the motion. On the motion for an upward
23 departure brought by the government, I grant the motion and
24 for the following reasons: I find that the crime that was
25 committed, looking at all of the facts and circumstances,

1 represented a crime that was unusually heinous, cruel,
2 brutal or degrading to the victim. I will refer to 5K2.8 of
3 the guidelines, the sentence guidelines and that language,
4 and recognizing in the guideline system that that is
5 anticipated to be a possible ground for an upward departure.

6 I also find that 5K2.3 represents that where the
7 facts indicate, a psychological injury and a physical injury
8 more serious than normal has been demonstrated to the Court
9 in this case. I don't feel that 5K2.21, which indicates the
10 Court can refer to the facts underlying a charge dismissed
11 as part of the plea agreement in the case, as I said in my
12 questioning of Ms. Higgins, makes a lot of sense to me.

13 What does make sense to me is that Mr. Begaye pled
14 guilty to aggravated sexual abuse under Section 2241(a), and
15 that is an admission of aggravated sexual abuse of another
16 person on an Indian reservation by force or threat. That is
17 what he pled to. I am entitled as the Judge to look at the
18 facts and circumstances that underlie that plea. That
19 includes in this case the fact that he repeatedly had
20 improper sexual intercourse with his young daughter over,
21 the facts demonstrate to me, a period of years. I am
22 looking at those as the actual facts of this case and not
23 looking at those as the facts that underlie or that were the
24 basis for another count that has been dismissed. Those are
25 the facts of this case.

1 Because the statute that I took the plea under and
2 on which I'm sentencing carries a sentence, statutorily, a
3 maximum of life in prison, I'm only looking at those
4 underlying facts to help me decide what is the most
5 appropriate sentence. I'm using the guidelines, which in
6 this case have a range of 210 to 268 months, and I am going
7 above that because of the two reasons that I just indicated,
8 under 5K2.8 and 5K2.3. I am staying generally within the
9 guideline process for doing this.

10 I do think sentencing sometimes gets away from
11 itself. No matter how many sentencing guidelines we write
12 and how many judges try to figure it out, we are still
13 basically looking for what happened and the nature of the
14 man who made that happen. Here I find the facts to be, as
15 anyone would, egregious and wrong and bad by any standard.
16 I think sometimes we forget how much time it is too. I find
17 an appropriate sentence to be here a 25-year sentence which
18 is an upward departure of some roughly two and a half years.

19 I will refer briefly to Section 3553(a) and the
20 factors that are always to be considered by a court in
21 imposing a sentence, and indicate that I feel that a
22 sentence above the sentencing range is necessary to reflect
23 the seriousness of the offense and to promote respect for
24 the law and to provide just punishment, and especially in my
25 view to afford adequate deterrence to others.

1 I would hope that somehow, and this is always a
2 hope and I never know if it happens, but I would hope that
3 some message gets out that if you do this kind of thing, in
4 particular have sex with a young daughter, that you're
5 looking at 25 years in federal prison at least. I am not
6 unaware of the fact that in the state court this would most
7 likely be a -- I'm guessing -- but I think it would be a
8 15-year sentence at the top. I don't know. There are a lot
9 a different ways people get punished in this country. I
10 think 25 years is a harsh penalty. I think Mr. Begaye
11 deserves it for what was done in particular to this one
12 young daughter.

13 I am not ignoring also the other relevant evidence
14 of the abuse that was administered to the other children as
15 well, which is inexcusable also.

16 With that explanation I'm going to also require a
17 supervised release period of life following his term of
18 incarceration. Mr. Begaye will be required to allow this
19 presentence report to be released to the state sex offender
20 registration agency if required for purposes of sex offender
21 registration. I'm going to require on supervised release
22 that the defendant participate in a sex offender treatment
23 program as directed by the probation. I will restrict the
24 defendant from contact with individuals under 18 years of
25 age without adult supervision and as approved by the

1 probation office in advance. I'll require the defendant
2 during supervised release to have his employment decisions
3 approved in advance by the probation office. If the
4 probation office requires, he will be obligated to inform
5 his employer of his supervision status.

6 The usual rules regarding reasonable searches will
7 be included. I'll require the defendant to submit to drug
8 and alcohol testing as directed by probation and pay a
9 one-time fee to help defer those costs, and participate also
10 in a substance abuse evaluation and treatment program under
11 a co-payment plan as directed by probation. I find the
12 defendant does not have the ability to pay a fine and waive
13 the fine. I order a special assessment fee in the amount of
14 \$100 which is due immediately.

15 I grant the government's motion for the dismissal
16 of all counts except for the ones the defendant pled guilty.

17 MS. HIGGINS: The defendant pled guilty to an
18 information, so we would ask the Court to dismiss the entire
19 indictment.

20 THE COURT: The indictment is dismissed on that
21 motion of the government.

22 I will recommend the facilities as requested by
23 Mr. Donaldson, Seagoville, Texas, and, if that is not
24 available, the facility in Marianna, Florida for treatment
25 opportunities.

1 Anything else?

2 MS. HIGGINS: Nothing further, Your Honor.

3 THE COURT: Mr. Donaldson?

4 MR. DONALDSON: No.

5 THE COURT: Good luck to you, Mr. Begaye.

6 We'll be in recess.

7 (Proceedings concluded.)

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